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HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 614

STATE OF WISCONSIN, ex rel
WISCONSIN LUTHERAN HIGH
SCHOOL CONFERENCE,

Appellant,

v.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

HERBERT L. MOUNT,
Special Counsel for City of Wauwatosa, Attorney and Counsel for Sid H. Sinar, Appellee.

HANNERSMITH-KORTHEVER CO. MILWAUKEE

CASES CITED

Page

American University v. Prentice, 113 Fed. Supp. 389; 214 Fed. 2d 282 15

Beery v. Houghton, 164 Minn. 146; 204 N.W. 569; affirmed—71 L. Ed. 832 7

Berman v. Parker, 75 S. Ct. 98 (Advance Sheets)..... 8

Breisch v. Central R. Co., 312 U.S. 484; 61 S. Ct. 662; 85 L. Ed. 964 7

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509; 81 L. Ed. 1245; 1253; 57 S. Ct. 868; 109 A.L.R. 1327 7

Church of Latter Day Saints v. City of Porterville, 90 Cal. 2d 656; 203 Pac. 2d 917 16

Cincinnati v. Wegehoft, (1928) 119 Ohio 136; 162 N.E. 389 15

Day-Brite Lighting Inc. v. State of Missouri, 342 U.S. 421; 72 S. Ct. 405, 407; 96 L. Ed. 469..... 9

Decatur Park Dist. v. Becker (1938) 368 Ill. 442; 14 N.E. 2d 490 15

DePalma v. Town Plan. Comm., 123 Conn. 257; 193 A. 868 15

Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 1199, 114 A.L.R. 1487 (Annot. 1500)..... 6

Euclid v. Ambler R. Co., 47 S. Ct. 114 8

Fischer v. St. Louis, 194 U.S. 361; 48 L. Ed. 1018.... 6

Golf Inc. v. Dist. of Columbia, 67 Fed. 2d 575 14

Henderson Lt. & Power Co. v. Blue Ridge Int. Ry. Co., 243 U.S. 568; 37 S. Ct. 441; 61 L. Ed. 905.... 12

Page

Independent Warehouse Inc. v. Wm. Scheele, 331 U.S. 70; 91 L. Ed. 1346 7

Lionshead Lake v. Wayne Township, 10 N.J. 165; 89 Atl. 2d 693; 344 U.S. 919, 73 S. Ct. 386; 97 L. Ed. 708 9

McCarter v. Beckwith, 285 N.Y. Supp. 151; 3 N.E. 2d 882; Certiorari denied, 299 U.S. 601; 57 S. Ct. 194; 81 L. Ed. 443 ..... 13, 14

Minneapolis & St. Louis R. Co. v. Minnesota, 193 U.S. 53 (64, 65); 24 S. Ct. 396; 48 L. Ed. 614..... 12

People v. McCall, 245 U.S. 345; 38 S. Ct. 122; 62 L. Ed. 337 6

Pure Oil Co. v. Minnesota, 248 U.S. 158; 39 S. Ct. 35; 63 L. Ed. 180 12

Radice v. New York, 264 U.S. 292, 294; 44 S. Ct. 325; 68 L. Ed. 690 8

Rescue Army v. Municipal Court, 331 U.S. 549; 91 L. Ed. 1666 6

State v. Sinar, 267 Wis. 91; 65 N.W. 2d 43.....3, 12, 15

State Tax Comm. v. Jackson, 283 U.S. 527, 75 L. Ed. 1248, 51 S. Ct. 540, 543; 73 A.L.R. 1464; 75 A.L.R. 1536 6

Wallerstein v. Westchester, 1 N.Y.S. 2d 111 15

Willoughby v. Chicago, 235 U.S. 45; 35 S. Ct. 23; 59 L. Ed. 123 13

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MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

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SID H. SINAR, Appellee in the above entitled cause, moves this Court to dismiss with costs the appeal taken to this Court by State of Wisconsin ex rel, Wisconsin Lutheran High School Conference, Appellant, upon the following grounds:

1. There is no substantial Federal question involved.
2. The main question is one of fact and therefore not reviewable in this Court.
3. The judgment rests upon an adequate non-Federal basis.

Dated this 23rd day of March, 1955.

HERBERT L. MOUNT,
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BRIEF

I. Statement of the Case.

The City of Wauwatosa, Wisconsin (Pop. 35,000) adopted a comprehensive zoning law in 1929 by which there were created 13 classes of land use districts: 5 residential, 2 institutions, 2 shopping, 2 business and 2 light manufacturing. In the highest class residential district (Class 'A'), the ordinance permits "Public Schools and Private Elementary Schools" but makes no limitation in respect to schools in any of the other 12 classes of districts.

Appellant contends that the above quoted exclusion of private *secondary* schools in Class 'A' residence districts denies it the equal protection of the laws and deprives it of its property without due process of law.

Appellant brought suit in the Circuit Court of Milwaukee County for a peremptory writ of mandamus to compel Sid H. Sinar, building inspector and appellee herein, to issue a building permit, notwithstanding the ordinance, for the construction of a proposed high school and athletic stadium on a 13 acre tract located in one of the Class 'A' residence districts of the city. Modern homes adjacent to the tract in question range in value from $25,000.00 to $75,000.00 and represent an aggregate value in excess of $1,000,000.00.

Appellant prevailed in the Circuit Court and a peremptory writ issued. On appeal to the Supreme Court of Wisconsin the judgment was reversed and the peremptory writ of mandamus ordered quashed. (State v. Sinar, 267 Wis. 91; 65 N.W. 2d, 43). This appeal is taken from the decision of the Supreme Court of Wisconsin after denial of rehearing.

II. Sid H. Sinar, appellee herein, objects to the appellant's statement as to jurisdiction heretofore filed and moves to dismiss said appeal on the following grounds:

(a) There is no substantial Federal question involved.

(b) The main question involved is a question of fact and is not reviewable in this Court.

(c) The decision of the state court rests upon an adequate non-Federal basis.

III. Argument.

A. There is no substantial Federal question involved.

The ordinance in question was adopted pursuant to statutory authority. Section 62.23(7), Wis. Stats. provides as follows:

> "(7) Zoning.
>
> (a) Grant of Power. For the purpose of promoting health, safety, morals or the general welfare of the community, the council may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes provided that there shall be no discrimination against temporary structures. This subsection and any ordinance, resolution or regulation, heretofore or hereafter enacted or adopted pursuant thereto, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. It shall not be deemed limitation of any power elsewhere granted.

(b) Districts. For any and all of said purposes the council may divide the city into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts.

(c) Purposes in view. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the over-crowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

The ordinance in question represents a familiar exercise of the state's police power by delegation thereof in broad terms to the subordinate municipalities. Determination of the needs and requirements of local public welfare is properly left to local legislative bodies with due regard for uniformity and reasonableness.

This Court is reluctant to consider constitutional objections to state or local legislation where a determination of public policy or the exercise of legislative judgment in the field of police regulation has occurred.

Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188 (1199), 114 A.L.R. 1487 (Annot. P. 1500).

> "The public policy underlying the passage of a zoning ordinance under provisions of a state statute is a matter to be determined by the municipal governing body.
>
> *State Tax Comm. v. Jackson,* 283 U.S. 527, 75 L. Ed. 1248, 51 S. Ct. 540, 543; 73 A.L.R. 1464; 75 A.L.R. 1536
>
> "The Supreme Court will not substitute its judgment for that of an administrative body (Public Service Comm.) as to wisdom or policy."
>
> *People v. McCall,* 245 U.S. 345; 38 S. Ct. 122; 62 L. Ed. 337.

In *Fischer v. St. Louis,* (194 U.S. 361, 48 L. Ed. 1018), this Court in considering a zoning provision held:

> 1. "The question of the power of a municipality to adopt an ordinance under its charter is not reviewable."
>
> 2. "The question of whether certain acts amount to a violation of a city ordinance is not reviewable."
>
> 3. "The decision of a state court construing such an ordinance does not present a Federal question."
>
> 4. "Neither due process of law nor the equal protection of the laws is denied by a municipal ordinance adopted under legislative authority, forbidding establishment or maintenance of a dairy or cow stable within the city limits without permission of the municipal assembly."

In *Rescue Army v. Municipal Court,* (331 U.S. 549; 91 L. Ed. 1666), this Court again reiterated its general

policy of avoiding decisions of constitutional questions involving local exercise of the police power.

In a case involving the enforcement of an occupational tax alleged to be discriminatory, this Court declared:

> "Rulings by the highest court of the state on questions of state law are conclusive upon the Supreme Court of the United States."
>
> *Independent Warehouses Inc. v. Wm. Scheele,* 331 U.S. 70; 91 L. Ed. 1346.

> "This court has repeatedly held that the inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation."
>
> *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 509; 81 L. Ed. 1245, 1253; 57 S. Ct. 868; 109 A.L.R. 1327.

This is not a case in which the state Supreme Court erroneously understood the applicability of Federal Law hence making the decision reviewable.

> "* * * a fixed interpretation of a state statute should be accepted by the Federal courts when it does not obviously depend altogether upon a misconception of Federal Law."
>
> *Breisch v. Central R. Co.,* 312 U.S. 484; 61 S. Ct. 662; 85 L. Ed. 964

For a comprehensive discussion of the extent to which Federal courts are bound by decisions of state courts of last resort in matters depending upon the construction of state statutes or constitutions see 83 L. Ed. 520 — annotation.

In *Beery v. Houghton,* (164 Minn. 146; 204 N.W. 569; affirmed — 71 L. Ed. 832) this court examined a

zoning ordinance attacked as confiscatory and held on the authority of *Euclid v. Ambler R. Co.,* (47 Sup. Ct. Rep. 114) that "a zoning ordinance must be clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals or *general welfare* before it can be declared unconstitutional." The foregoing case reviews the trend of state decisions toward supporting broad powers and a wide range of discretion by legislative bodies in the exercise of the police power in the field of public welfare and held that

> "If the validity of the classification is fairly debatable the legislative judgment must be allowed to control" citing *Radice v. New York,* 264 U.S. 292, 294; 44 S. Ct. 325; 68 L. Ed. 690.

Berman v. Parker (75 S. Ct. Rep. 98 — advance sheets) was decided November 22, 1954. The District of Columbia, under authority of a slum clearance and housing act, and proceeding under the power of eminent domain proposed to take the business property of petitioner which was inoffensive and not objectionable by aesthetic standards. Petitioner objected on the ground that such taking violated the due process clause of the 5th Amendment. In its decision this court said:

> "Subject to specific constitutional limitations, when a legislature has spoken, public interest has been declared in terms well-nigh conclusive."
>
> "The legislature or Congress, as the case may be, and not the judiciary, is the main guardian of public needs to be served by social legislation."
>
> "Public safety, public health, morality, peace and quiet and law and order do not constitute the entire scope of police power."
>
> "The concept of public welfare is broad and inclusive."

The Court proceeded to cite with approval the language of its decision in *Day-Brite Lighting Inc. v. State of Missouri,* (342 U.S. 421; 72 S. Ct. 405, 407; 96 L. Ed. 469):

> "The Supreme Court does not sit as a super-legislature to weigh the wisdom of legislation or to decide whether the policy which it expresses offends public welfare".
>
> (In the latter case a Missouri statute requiring employers to give employees four hours time without loss of pay on election days was objected to as a violation of the due process and equal protection clauses of the 14th Amendment and the contract clause of Art. I, Sec. 10).

More directly in point is *Lionshead Lake v. Wayne Township,* 10 N.J. 165; 89 Atl. (2d) 693, in which *two justices of the New Jersey Supreme Court dissented,* and in which the appeal to this Court was dismissed for want of a substantial Federal question. (344 U.S. 919; 73 Sup. Ct. Rep. 386; 97 L. Ed. 708).

A zoning ordinance restricted residential areas to buildings of certain minimum "living floor space" and was attacked as not reasonably related to public health, arbitrary and unreasonable, and not within the police powers of the defendant municipality. The zoning ordinance in question was adopted pursuant to authority granted by an enabling statute which permitted municipalities to regulate "the location and use and extent of use of buildings and structures and land for trade, industry, residence or *other purposes*" and to "regulate and restrict the erection, construction, reconstruction, alteration, repair and use of buildings or other structures, and the *nature and extent of the uses of land* within such [zoning] districts."

The purposes prescribed in the New Jersey enabling statute were almost identical with the provisions of the corresponding Wisconsin act. In sustaining the ordinance the New Jersey Court said:

> "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously."

The *Lionshead* case is especially significant because the New Jersey court sustained the regulation of "living floor space" for aesthetic reasons upon the broad ground of general public welfare, — a highly debatable proposition which, until very recently, has been universally disapproved by the courts upon constitutional grounds. Nevertheless, as pointed out above, this Court dismissed the appeal for want of a Federal question although two justices of the New Jersey Court dissented and although the great weight of authority among the state courts was also to the contrary.

The ordinance involved in this appeal represents no more than an effort by the City of Wauwatosa to reasonably regulate the location of private high schools and athletic stadia in the interest of the general public welfare by preventing the impairment and depreciation of existing property values. Its legal right to so regulate is approved by the sovereign State of Wisconsin and it seems quite clear that no Federal question is presented.

B. The main question involved is a question of fact and is not reviewable in this Court.

It must be presumed upon this appeal that the legislative body enacted the ordinance in question with one or more of the "purposes in view" as prescribed in the enabling statute. (Sec. 62.23(7)(c)). This subsection, among other things, permits the adoption of zoning laws "to promote * * * the general welfare," and directs the municipal legislative body to consider "* * *" the *character of the district* and its peculiar suitablity for particular uses, * * * with a view to *conserving the value of buildings* and encouraging the most appropriate use of land throughout such city." All such matters involve the determination of facts by the local legislative body in accordance with the mandate of the statute and the said body *has* determined that the provision to compel private high schools and appendant athletic fields to locate in any of the 13 classes of districts *except* Class 'A' residential, will "conserve the value of buildings" and "promote the general welfare."

This determination of fact was approved and confirmed by the Wisconsin Supreme Court in the following language:

> "Appellants have made it abundantly clear that respondent's projected school has many features which seriously impair the social and economic benefits to the entire community which the zoning law is designed to preserve and promote. It will add to the congestion of the surrounding streets. Athletic events will bring noisy crowds and if the contests are held at night, there will be bright lights to interfere with the peace and comfort of the neighborhood. The school property will be taken from the tax roll, thus increasing the financial burden of the city's taxpayers. The presence of the school will

> lessen the taxable value of nearby homes and will deter the building of new homes in the area." *(State v. Sinar,* 65 N.W. 2d 43, 46.)

We contend that the foregoing findings of fact lawfully made pursuant to a valid state statute is sufficient to support the judgment of the Wisconsin Court.

In *Minneapolis & St. Louis R. Co. v. Minnesota,* (193 U.S. 53 (64-65), 24 S. Ct. 396; 48 L. Ed. 614) the decision of the Minnesota Supreme Court depended upon a finding of fact of "public necessity" as to an order of the state Railroad Commission to compel plaintiff to erect a depot. Plaintiff claimed the order was so unreasonable as to amount to a deprivation of plaintiff's property without due process of law. The U.S. Supreme Court held that the finding of "public necessity" by affirmance in the state Supreme Court left no substantial Federal question on appeal.

The above case was cited with approval in *Hendersonville Light & Power Co. v. Blue Ridge In. Ry. Co.* (243 U.S. 568; 37 S. Ct. 441; 61 L. Ed. 905) in which this Court held that a condemnation of land based upon a finding of "public necessity" in the court below was not a denial of due process of law.

In *Pure Oil Co. v. Minnesota,* (248 U.S. 158; 39 S. Ct. 35, 63 L. Ed. 180) this Court concluded that findings of fact by a state court that certain legislation promoted public safety will not be disturbed but will be accepted as conclusive by the U.S. Supreme Court.

In a case involving the validity of assessments of benefits and damages under the police power of a municipality challenged on constitutional grounds, this Court declined to review for the reason that the issue was primarily one

of fact. (*Willoughby v. Chicago,* 235 U.S. 45; 35 S. Ct. 23; 59 L. Ed. 123)

Prevention of the diminution of property values is a proper consideration in the enactment of zoning laws. 117 A.L.R. 1127—N 28.

C. The decision of the state court rests upon an adequate non-Federal basis.

Under this subdivision we propose to discuss the appellant's claim of discrimination and denial of equal protection of the laws which we contend is unsupported by any Federal authorities and does not raise a substantial Federal question. The U.S. Supreme Court will not review a decision of a state court if it rests upon adequate, tenable state grounds even though a Federal question is presented and preserved. *McCarter v. Beckwith,* 285 N.Y. Supp. 151, 3 N.E. 2d 882; Certiorari denied, 299 U.S. 601; 57 S. Ct. 194; 81 L. Ed. 443.

The gist of appellant's contention is that since the ordinance prohibits private secondary schools in Class 'A' residential districts but fails to prohibit public secondary schools in such districts there is an illegal classification and therefore discrimination in the constitutional sense. *It is not claimed that any public secondary school exists in any such district.* Indeed, the answer of the interpleaded defendant alleges that no public high school is located in an 'A' residential district, (App. Br. 44). (This fact was admitted by appellant's demurrer to said answer.)

There is no conflict in the authorities as to the rule that valid classification for zoning may be based on distinctions between municipal and private property and

activities. It is elemental that illegal discrimination can be said to occur only when the parties involved are "similarly situated" and that any reasonable distinction or difference is adequate ground for classification. These rules are recognized in the dissenting opinion of the Wisconsin Court (App. Br. 32) but the author (Mr. Justice Steinle) urges that there should be an exception to the rule in the case of schools. However, many other conceivable exceptions could be urged with equal facility and there would soon be no rule.

We believe the correct rule to be that unlawful discrimination in the constitutional sense does not occur when the relationship between the parties is that of governor and governed and that a municipality can, by means of a zoning law, prohibit the use of certain land for any specific private purpose but use the same or similar land for an identical public purpose when such a public purpose is connected with the discharge of a governmental function. *McCarter v. Beckwith,* (supra).

> "In *Golf Inc. v. District of Columbia,* (67 Fed. 2d 575) a corporation established a driving range in a residential area. The ordinance prohibited this activity although it would have been permitted if conducted under public auspices. The corporation contended that the zoning ordinance was void because it made an unreasonable classification. The decision rested on the distinction between public benefit and a more restricted advantage which we make in the instant case."
>
> "The headnote states:
>
> > 'Zoning regulations *held* not discriminatory because permitting use of lands in residential districts for public recreational purposes while denying to private individuals similiar use, * * *

"In the opinion on P. 577 the court said:

'It is also contended by the corporation that the regulations are discriminatory in that they permit the use of lands in residential zones in the District of Columbia for public recreational purposes, but deny a similar use to private individuals.

We cannot agree with this contention. A use of public parks or recreational grounds in a residential area for the common benefit of all the people of the District is not to be compared with the use of lands by a private corporation for its exclusive profit in a manner forbidden by the zoning regulations.'

"In *Cincinnati v. Wegehoft* (1928),(119 Ohio 136, 162 N.E. 389), an effort was made to enjoin the city from building a fire house in an area zoned for residential purposes only, except that the ordinance provided that the city was exempt from such restriction as far as the erection of its own municipal buildings was concerned. The court held that this discrimination did not violate the state and federal constitutions." (From decision in State v. Sinar, supra)

There is a valid distinction under zoning laws where an exclusive use is permitted to the city for purposes connected with its governmental functions. *117 A.L.R. 1146.* The rule was held to apply to the construction of a water tower, *(Wallerstein v. Westchester,* 1 N.Y.S. (2d) 111), public parks and playgrounds, (*Decatur Park District v. Becker* (1938) 368 Ill. 442; 14 N.E. (2d) 490), and to a public dump and rubbish incinerator *(DePalma v. Town Planning Comm.,* 123 Conn. 257, 193A. 868.

American University v. Prentice, 113 Fed. Supp. 389, affirmed in *Prentice v. American University,* 214 Fed. 2d 282, cited by appellant involved a clear abuse of the

zoning power. In that case the District of Columbia Zoning Commission *deliberately rezoned* the university campus to prevent its use for the construction of a hospital. The Federal court properly held that the purpose of the regulation (which amounted to "spot Zoning") had no reasonable relationship to public health, morals or general welfare.

But the trend in the decisions is distinctly in the direction of permitting the establishment by zoning laws of exclusive residential districts even to the exclusion of churches. In *Church of Latter Day Saints v. City of Porterville,* 90 Cal. 2, 656; 203 Pac. 2d, 917, the California Supreme Court ruled that the exclusion of churches from certain residential districts was valid and did not constitute an unwarranted restriction of religious worship. This case discusses and upholds the several rules and presumptions heretofore discussed in this brief.

Appellant's claim of unconstitutionality based upon deprival of property without due process of law is hardly reasonable in a case of this kind where the record shows that appellant's acquisition of the property was just before commencement of this action and with full knowledge of the legal impediments. The constitutional amendment in question was not adopted to allow persons to knowingly assume a vulnerable position contrary to law and then invoke the constitution to extricate them from such position. This should be especially true in an equitable case in which the appeal is made to the court's conscience and the plaintiff presumably has become an innocent victim of an alleged unconstitutional regulation.

CONCLUSION

It is respectfully submitted that the Supreme Court is without jurisdiction as to the issues presented by this appeal. The decision appealed from rests primarily upon findings of fact legally determined by a competent legislative body acting pursuant to a valid enabling state statute which findings were approved and confirmed by the Wisconsin Supreme Court; that the decision therefore rests upon adequate tenable state grounds of law and fact and that the claim of illegal discrimination is untenable, unsupported by sufficient Federal precedent and presents no substantial Federal question. The appeal should therefore be dismissed.

Respectfully submitted,

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April 5, 1955

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In re: State ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE, Appellant
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Appellees

October Term 1954

No. 614

Dear Sir:

Our motion to dismiss the above appeal and our brief in support of said motion were served on March 23, 1955, and forty printed copies filed in your office a few days later in accordance with the rule. Since the preparation of said brief, a case has come to our attention which is directly in point on all fours with the facts and issues in the instant appeal.

We desire to call this decision to the attention of the Supreme Court of the United States with the feeling that it may be helpful to the Court in arriving at a decision on the motion to dismiss and we enclose herewith ten copies of this letter which we trust can be accepted as a supplemental memorandum.

In re: Great Neck Community School was decided by the New York Circuit Court of Nassau City on March 16, 1955. A municipal Zoning ordinance barred private schools from certain residential areas although permitting public schools in [illegible] area and the Court held that such regulation is not invalid or unfairly discriminating against private schools.

Following are excerpts from the decision:

"The state has not subordinated to the villages its right to determine where its school buildings are to be located and the villages have no right to control the paramount power of the state. The villages themselves spring into being by leave of the state and must operate within their delegated authority."

"Private schools are different. They are aiding, under state supervision, in the necessary and important function of education, but they are not the state in action. They do not, for example, possess the power of eminent domain. Nor are they empowered to cause a tax to be voted upon by the people. They are managed by persons elected in elections by citizens of the state. In short, private schools are something less in prerogatives than in the public schools. There is thus a valid basis for denying to a village the power to control by zoning regulations the state school system by granting to the village the power to set aside areas by zoning regulations in which private schools are not permitted. * * * *"

Very truly yours,

Herbert L. Mount

Herbert L. Mount
Attorney for Appellees

HLM:am

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BRIEF OPPOSING MOTION TO DISMISS APPEAL

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SUBJECT INDEX

Page

Nature of the Brief 1

Statement of the Issue 1

Contentions of the Appellee 2

Contentions of the Appellant 2

Appellant's Argument 2-11

Appellee's motion to dismiss must fail because:

(i) There is a substantial federal question involved 2-7

(ii) The main question is not one of fact; and, in any event, this is not a ground for dismissal under the rules of this Court 7-9

(iii) The validity of the Wisconsin Statute having been challenged as repugnant to the federal constitution and having been declared valid, the judgment rests upon a federal question only, and not on an adequate non-federal basis 9-11

Conclusion 11-12

Cases Cited

American University v. Prentice, 113 Fed. Supp. 389 11

Beery v. Houghton, 164 Minn. 146; 204 N.W. 569; 273 U.S. 671 5

Berman v. Parker, 75 S. Ct. 98 (Advance Sheets) 99 L. Ed. (Advance p. 63) 6

Breisch v. Central R. Co., 312 U.S. 484; 61 S. Ct. 662; 85 L. Ed. 964 5

Page

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509; 57 S. Ct. 868; 81 L. Ed. 1245, 1253; 109 A.L.R. 1327 5

Church of Latter Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 Pac. 2d 823; 338 U.S. 805, 94 L. Ed. 487 11

Cincinnati v. Wegehoft, (1928) 119 Ohio 136, 162 N.E. 389 10

Day-Brite Lighting Inc. v. State of Missouri, 342 U.S. 421; 72 S. Ct. 405, 407; 96 L. Ed. 469..... 6

Decatur Park Dist. v. Becker (1938) 368 Ill. 442; 14 N.E. 2d 490 10

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Fischer v. St. Louis, 194 U.S. 361; 48 L. Ed. 1018.... 4

Golf Inc. v. Dist. of Columbia, 67 Fed. 2d 575..... 10

Hendersonville Lt. & Power Co. v. Blue Ridge Int. Ry. Co., 243 U.S. 568; 37 S. Ct. 441; 61 L. Ed. 905 8

Independent Warehouse Inc. v. Wm. Scheele, 331 U.S. 70; 91 L. Ed. 1346 5

Lionshead Lake v. Wayne Township, 10 N.J. 165; 89 Atl. 2d 693; 344 U.S. 919, 73 S. Ct. 386; 97 L. Ed. 708 ..... 3, 6

Page

McCarter v. Beckwith, 285 N.Y. Supp. 151; 3 N.E. 2d 882; Certiorari denied, 299 U.S. 601; 57 S. Ct. 194; 81 L. Ed. 443 ..... 9, 10

Minneapolis & St. Louis R. Co. v. Minnesota, 193 U.S. 53; 24 S. Ct. 396; 48 L. Ed. 614 8

People v. McCall, 245 U.S. 345; 38 S. Ct. 122; 62 L. Ed. 337 4

Prentice v. American University, 214 Fed. 2d 282.... 11

Pure Oil Co. v. Minnesota, 248 U.S. 158, 39 S. Ct. 35; 63 L. Ed. 180 8

Radice v. New York, 264 U.S. 292, 294, 44 S. Ct. 325; 68 L. Ed. 690 5

Rescue Army v. Municipal Court, 331 U.S. 549; 91 L. Ed. 1666 5

State ex rel Wisconsin Lutheran High School Conf. v. Sinar, 267 Wis. 91, 96, 101, 65 N.W. 2d 43, 48 (Instant case) 3, 7, 8

State Tax Comm. v. Jackson, 283 U.S. 527; 51 S. Ct. 540, 543; 75 L. Ed. 1248; 73 A.L.R. 1464; 75 A.L.R. 1536 4

Wallerstein v. Westchester, 1 N.Y.S. 2d 111 10

Willoughby v. Chicago, 235 U.S. 45; 35 S. Ct. 23, 59 L. Ed. 123 9

Text Book Cited

Cyclopedia of Federal Procedure, 3d Edition; §57.188, pp. 285, 287 9